In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, PETITIONER,
v.
THE CORNELL STEAMBOAT COMPANY,
Respondent.
No. 239.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a proceeding against the United States begun in the District Court for the Southern District of New York and alleged to be permitted by the act of March 3, 1887, chapter 359—the Tucker Act—(24 Stat., 505) to recover for services rendered in saving a cargo of sugar, upon which duties amounting to $6,000 had been paid, from destruction by fire. In substance the petition alleged (R., 2)—

That in January, 1901, the lighter *Bangor*, having on board 1,883 bags of sugar, while in the port of New York was in danger of being destroyed by fire and was saved by petitioner's tug;

That the sugar was subject to duty and at the time of the fire was in possession and under control of custom-house officers;

That petitioner filed a libel in the District Court of the United States against the cargo to recover compensation for the salvage services and was awarded 10 per cent of the value of the property saved—with duties unpaid; and the court held that as it appeared the duties had been paid provisionally and in such wise that if the merchandise had been destroyed by fire the owners could have claimed repayment, the recovery should be estimated upon their value without considering such duties;

That by reason of the services rendered the $6,000 collected by the Government was saved, and petitioner is entitled to have and claim against the United States by reason of said services and said decree the sum of $600 "inasmuch as the said duties in possession of the United States were entirely saved to the United States by the services of the petitioner as above stated."

A demurrer suggesting the want of jurisdiction and that the facts stated no cause of action was overruled (R., 4, 5).

The court entered of record its findings and conclusions (R., 6, 8), and directed judgment for $600 (R., 8).

The Circuit Court of Appeals affirmed the action of the District Court (R., 17, 18), and the cause was brought here by certiorari.

STATUTES.

The Tucker Act of March 3, 1887, chapter 359, (24 Stat., 505) provides—

> That the Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *
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> SEC. 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

Revised Statutes, section 2984.

> The Secretary of the Treasury is hereby authorized, upon production of satisfactory

proof to him of the actual injury or destruction, in whole or in part, of any merchandise, by accidental fire, or other casualty, while the same remained in the custody of the officers of the customs in any public or private warehouse under bond, or in the appraisers' stores undergoing appraisal, in pursuance of law or regulations of the Treasury Department, or while in transportation under bond from the port of entry to any other port in the United States, or while in the custody of the officers of the customs and not in bond, or while within the limits of any port of entry, and before the same have been landed under the supervision of the officers of the customs, to abate or refund, as the case may be, out of any moneys in the Treasury not otherwise appropriated, the amount of impost duties paid or accruing thereupon; and likewise to cancel any warehouse bond or bonds or enter satisfaction thereon in whole or in part, as the case may be.

Revised Statutes, section 3689.

There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same, respectively, and such appropriations shall be deemed permanent annual appropriations.

Admiralty Rule 19.

In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed.

ARGUMENT.

I.

The District Court had no jurisdiction.

Every Government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted it is only on such terms and conditions as are prescribed. The principle is fundamental, applies to every sovereign power, and but for such protection the Government would be unable to perform the various duties for which it was created. To collect revenue for its support would be impossible without infinite embarrassments and delays if it was subject to civil process the same as a private person. (*Nichols* v. *United States*, 7 Wall., 122, 126.)

The doctrine is well established that no suit can be sustained in which the United States is made an original defendant, to be brought into court by process, without some act of Congress expressly authorizing it to be done. (*The Davis*, 10 Wall., 15, 19.)

(a)

Unless granted by the Tucker Act the trial court was without authority to afford relief.

That statute in effect waives the exemption of the Government from suits in certain specified matters—viz, claims founded upon the Constitution or laws of the United States, regulations of an Executive Department, contracts, expressed or implied, with the Government, or for damages in cases not sounding in tort, in respect of which claims the party would be

entitled to redress against the United States in a court of law, equity, or admiralty if they were suable.

Obviously the present controversy, if provided for at all, must be one arising out of contract, expressed or implied, or from damages, in respect of which respondent would be entitled to redress against the United States in a court of law, equity, or admiralty if suable as a private individual.

There was no contract, expressed or implied, between the Government and the respondent and no such thing is alleged in the petition. The services to the cargo were purely voluntary, and although they may have been beneficial that is not sufficient to establish a contract. They were sufficient in maritime law to create a lien against the cargo, enforceable in a proceeding *in rem*—the full and only measure of relief to which respondent was entitled. The provision of the statute relating to contracts does not apply.

The claim is not one in respect of which respondent would be entitled to redress in a court of law, equity, or admiralty against a private individual.

No recovery, either at law or in equity, is possible for purely voluntary services.

A proceeding in admiralty *in personam* against a private individual for salvage allowance is not permissible unless the service was performed "at his request and for his benefit," or unless in some way a proceeding *in rem.* against the thing salved has become impossible—as, e. g., by clandestine removal or destruction after delivery to the owner. Benefit, however

great, from salving a cargo can not support a claim *in personam* for the services rendered. (Admiralty Rule 19; *The Sabine*, 101 U. S., 384, 389.)

It follows that if the Government were subject to suit as an individual, respondent's claim for saving the cargo in question could not be enforced by a proceeding *in personam* against it.

(b)

Section 2984, Revised Statutes, specifies the sole method assented to by the Government for securing refund of duties paid upon merchandise afterwards destroyed. The matter must be presented to the Secretary of the Treasury, and he alone is authorized to direct payment "upon production of satisfactory proof to him of the actual injury or destruction, in whole or in part, of any merchandise by accidental fire, or other casualty, etc." The courts have no jurisdiction of an original proceeding to enforce such a claim—whatever might be their power in a case where the Secretary should refuse to perform his duty.

If the cargo of sugar had been actually destroyed the court certainly would have had no jurisdiction of any action to recover the duties paid, unless and until application had been first made to the Secretary and adequate proof presented to him showing loss by accident. He is the special tribunal to which that matter must be first submitted. It is unnecessary now to discuss the power of the courts to superintend his action.

As the party who paid the duties could not, ignoring the Secretary, maintain an original proceeding in court

to secure repayment, it appears manifest, in the absence of clear and specific authorization, that the court has no jurisdiction of a like proceeding to enforce a demand for compensation in behalf of one who claims to have prevented the necessity of repayment.

There is no warrant for the judgment against the United States for services rendered in saving something owned by another, the actual destruction of which would not have imposed on them a liability enforceable in court.

(c)

The claim set up in the present proceeding must be regarded as under the revenue laws. Such claims are not within the jurisdiction of the courts, since those laws constitute a distinct and exclusive system of collection and redress.

In *Nichols* v. *United States* (7 Wall., 122, 131), this court said: "We are satisfied that cases arising under the revenue laws are not within the jurisdiction of the Court of Claims."

In *D. M. Ferry & Co.* v. *The United States* (85 Fed., 550), the Circuit Court of Appeals for the Sixth Circuit, following the Nichols case, denied the jurisdiction of the court to entertain a petition asking judgment for duties paid upon articles destroyed by fire, the right thereto being asserted under section 2984, Revised Statutes. Among other things it said (p. 555):

> To avoid the effect of the Nichols case upon the question before us, it is pointed out that in

that case the revenue laws themselves provided a remedy by which the taxpayer might bring the Secretary's decision under review in the courts, but that here there is no such provision. This is true, but the Nichols case did not proceed on the ground that there had been an appeal to the courts provided for within the revenue acts themselves; nor was it intimated that a suit in the Court of Claims would have been permitted had no such appeal to the courts been provided. On the contrary, the plain effect of the decision is that if the intention of Congress is manifest to create the Secretary of the Treasury a tribunal to decide whether a wrong has been committed under the revenue law, and has made no provision for an appeal, because the revenue law provides a complete system within itself, the presumption must be that it was intended to make the decision of the special tribunal thus established final.

See also

State Railroad Tax Cases, 92 U. S., 614.
Auffmordt v. *Hedden*, 137 U. S., 324.
Treat v. *Staples*, Cir. Ct. Dist. of Maine, 1870, 1 Holmes 5; 24 Fed. Cases, 14162.

II.

Upon the facts, respondent's claim is without merit.

What respondent did was purely voluntary and such services, however meritorious or beneficial, create no obligation enforceable against the beneficiary either in law or equity.

The general principle is, beyond all question, that work and labor done or expended by one man to preserve or to benefit the property of another do not, according to English law, create any lien upon the property saved or benefited, nor even, if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more that you can confer a benefit upon a man against his will. The maritime law, for the purposes of public policy, and for the advantage of trade and commerce, imposes in cases of salvage a *jus in re*, a liability upon the thing saved—a liability which is a special consequence arising out of the character of mercantile enterprise, the nature of the sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances.

Kennedy on Civil Slavage, 6.

Falcke v. *Scottish Imperial Ins. Co.*, 34 Ch. Div., 234, 248.

The Blaireau, 2 Cranch, 240, 265.

The Emblem, 8 Fed. Cas., 4434.

Did any liability arise according to the rules of maritime law?

In his brief opposing the application for certiorari counsel for respondent said of this cause, "It is a suit in admiralty to recover salvage on an implied contract in accordance with the decision in the case of *The Monarch*." And unless under the rules governing salvage claims liability for the alleged service arose no judgment therefor can be rightly given.

The duties having been paid, the Government had no lien upon or title to or property interest in the merchandise.

Respondent says in effect that if the cargo had not been saved the Government would have been compelled to return the tariff charges collected upon it. Manifestly, respondent extended no aid to and had no possession of anything belonging to the United States. At most, its efforts prevented the accruing of a money demand, and in that particular were beneficial.

In a sense, the Government may be said to receive benefit whenever a cargo is salved, brought into port, and duties collected—the payment would not have been made if the salving had not occurred; and a certain benefit follows the importation of every dutiable article. But no one could imagine that a suit would lie to recover in either of those cases.

Benefit alone from the salving of a cargo is not sufficient to render the beneficiary liable to a judgment for compensation in an action *in personam*. One whose life is saved from the sea in law owes nothing therefor; no insurer of goods salved, nor one who holds a respondentia bond thereon, nor a seaman whose wages are preserved can be directly proceeded against for the services; and the owner of property rescued is under no personal obligation to pay compensation.

Salvage is eminently a subject for admiralty jurisdiction, and it has been decided that no action will lie at common law unless the salvor can prove a contract

with the owner of the property saved or with his agent. (2 Parsons on Shipping and Admiralty, 260.)

It must be obvious and certain that the master's reluctance or resistance to the saving of the property under his charge should not bar claims of salvors, but rather enhance them, if their services were necessary or in all respects meritorious and useful. (Ib., 264.)

The rule of rewarding salvors is grounded on policy. It is desirable to encourage those who chance to be in a position to help vessels in distress to use their best exertions, to risk if necessary their own lives and property, and to delay their adventures for that purpose. The prospect of reward, which is generally assessed liberally, brings out a readiness and strenuousness which can not always be expected without that motive, and both lives and property at sea are thus made more safe. (Carver's Carriage by Sea, 3d ed., sec. 323.)

If we search through all the books, from the rules of Oleron to the present time, we shall find that salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued. (*Cope* v. *Vallette Dry Dock Company*, 119 U. S., 625.)

The right does not arise on saving property of other kinds which may have been moored afloat, and have got adrift, such as a raft of timber, a buoy, or a floating dry dock. (Carver's Carriage by Sea, 3d ed., sec. 322.)

The foundation of the admiralty jurisdiction in the awarding of salvage is the power of enforcing the maritime lien obtained on property saved by salvors. (*The Cargo Ex. Schiller*, 2 L. R., P. D., 145, 149.)

In *The Emblem*, District Court, D. Maine, 1840 (8 Fed. Cas., No. 4434), the court said:

> All the authorities speak of the right of the salvor as attaching to the thing, and not as the foundation of any personal claim against the owner, independent of the goods saved. The customs of the sea, as we have them collected in all the old maritime codes, treat the salvor's claim in the same way as a right against the property saved, and the usual mode of compensating the service is by the allowance of a certain portion of the goods saved or of their value. The service is nowhere spoken of as constituting the ground of a personal claim against the owners.

The Independence, Cir. Ct. Mass., 1855; 13 Fed. Cas., 7014.

In *The Sabine* (101 U. S., 384) this court declared that under the nineteenth admiralty rule an action *in personam* for salving services could not be sustained unless they were at the request and for the benefit of the defendant, or at least in those cases where the property had been destroyed or removed after having been restored.

Salving charges can not be enforced for rescuing bills of exchange and other evidences of debt. (*The Emblem*, 8 Fed. Cas., No. 4434.)

Salvage can not be awarded for saving the United States mails because not subject to detention and sale. (*The Merchant*, 17 Fed. Cas., No. 9435.)

III.

The authorities relied upon for the respondent.

In the opinion of the Circuit Court of Appeals (R., 14), *Supervisors* v. *United States* (4 Wall., 435), and other cases are cited as authority for the contention that under section 2984, Revised Statutes, the Secretary of the Treasury was not vested with arbitrary discretion as to the return of customs duties in cases where the merchandise has been accidentally destroyed by fire or other casualty.

It is unnecessary to discuss here the power of the court by mandamus to compel the Secretary of the Treasury to do what he ought to do. For this argument that may be admitted. But when Congress has prescribed a particular mode according to which one who seeks a return of duties must proceed he can not be permitted to ignore the prescribed tribunal and resort in the first instance to the courts.

United States v. *Morgan* (99 Fed., 570).

This was a proceeding under the Tucker Act to recover compensation from the Government for saving a light-ship, in which relief was granted.

A ship actually saved remained in the possession of its owner. If the rescued vessel had belonged to an individual, the salvors would have been entitled

to their reward and could have enforced it either by an action *in rem* or, if deprived of the lien, by an action *in personam*. The vessel could not be withheld, and the Government by retaining it deprived the salvor of his lien. Under such circumstances I submit a proceeding *in personam* against an individual owner would have been proper.

The Morgan case does not support the radically different contention here advanced.

Five Steel Barges, 15 L. R., P. D. (1890), 142.

The Port Victor, Aspinall's Maritime Cases (1901), 163.

In *Five Steel Barges* vessels constructed by defendants under contract with the Government were to be delivered within twelve months, and the purchase money, except one installment, had been paid at the time of the salvage. After they were delivered to the Government an action *in personam* was brought against the builders. The court held the defendants had a substantial interest to the full value of the barges at the time of the services and that the action would lie.

By the acts of Parliament of 1854, 1861, and 1862 the right to proceed *in personam* in courts of admiralty was enlarged, and these acts must be considered in connection with the opinion.

The act of 1854 provided:

> That in all cases in which a party had a cause or right of action in the Court of Admiralty against any ship, or freight, goods, or

> other effects whatever, it should not be necessary to the institution of the suit for such person to sue out a warrant for the arrest thereof, but it should be competent to him to proceed by way of personal action, citing the owner or owners of such ship, freight, goods, or other effects to appear and defend the suit.

The circumstances in *Five Steel Barges* were exceptional, and the holding ought not to be followed where the facts are entirely different.

> Kennedy on Civil Salvage, 12.
> Carver on Carriage by Sea, § 324 a.
> Williams and Bruce on Admiralty, 321.

In *The Port Victor* the court distinguished the interests of the defendant from that of a mortgagee or insurer or the lender upon a bottomry or respondentia bond, but approved the doctrine announced in the *Five Steel Barges*.

The English courts were, of course, proceeding in view of the statutes above cited and were not constrained by any legislation similar to our nineteenth admiralty rule. Whatever may be said touching the soundness of the doctrine announced in that country, it appears directly in conflict with Rule 19 and the opinion of this court in *The Sabine* (101 U. S., 390).

IV.

The respondent freely asserted its rights by a proceeding in rem against the cargo, and has had all the relief to which it was entitled.

In *Cornell Steamboat Co.* v. *1,883 Bags of Sugar* (108 Fed., 277) respondent sought to recover by a proceeding *in rem* compensation for the salvage services based upon the value of the sugar with duties paid. The court, in fixing the amount for which judgment should be given, refused to consider the $6,000 paid for duties, and no appeal was taken.

If the duties had been included in estimating the value of the salved cargo, manifestly this action against the Government would not lie; and I submit no liability can properly arise because of the decision in that proceeding. The action *in rem* against the goods themselves was the proper, appropriate method for securing relief, and if the respondent failed to obtain satisfactory compensation the Government can not be called upon to make good the deficit. The remedy, if any, was by appeal.

I respectfully ask that the judgment of the court below be reversed.

J. C. McReynolds,
Assistant Attorney-General.

April, 1906.

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